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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

CORY JOSEPH ANDERBERG,

Defendant and Appellant.

E065563

(Super.Ct.No. INF1202192)

OPINION

APPEAL from the Superior Court of Riverside County. Becky Dugan, Judge.

Reversed with directions.

Frank J. Torrano, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Eric A. Swenson, Assistant Attorney General, and Allison V. Hawley, Deputy Attorney General, for Plaintiff and Respondent.

In 2012, defendant and appellant Cory Joseph Anderberg pleaded guilty to two counts of second degree burglary (Pen. Code,<sup>1</sup> § 459; counts 1 and 3) and one count of acquiring or retaining access card account information (§ 484e, subd. (d); count 6). The trial court imposed an aggregate sentence of four years and four months.

Subsequently, defendant petitioned twice for relief pursuant to the Safe Neighborhoods and Schools Act, enacted by the voters as Proposition 47 in the November 2014 election. The trial court denied his first petition, but granted defendant leave to refile a new petition with additional evidence. Defendant's second petition, supported by additional evidence, was also denied by the trial court; it is this ruling that is at issue in the present appeal.

On appeal, defendant contends that the trial court erred by denying his second petition with respect to each of the three convictions. We agree, and therefore reverse the trial court's ruling.

## I. FACTUAL AND PROCEDURAL BACKGROUND

In June, July, and August 2012, defendant repeatedly entered a grocery store and lingered near the ATM of a bank branch located inside the store. On 10 occasions, he gained access to the accounts of ATM users who either failed to log out after completing their transactions, or inadvertently left their ATM card in the machine. The total loss from the 10 fraudulent transactions was \$3,000, but no single transaction exceeded \$950.

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

Defendant was charged with 10 counts of second degree burglary (§ 459) and 10 counts of acquiring or retaining access card account information (§ 484e, subd. (d)). He pleaded guilty two counts of second degree burglary (counts 1 and 3), involving takings of \$200 and \$100 respectively, as well as one count of acquiring or retaining access card information, involving the taking of \$400 (count 6). The trial court sentenced him to an aggregate term of four years four months, structured as 16 months in custody followed by three years of supervised release.

The Proposition 47 petition at issue in this appeal was filed on September 2, 2015. On March 4, 2016, the trial court denied the petition.

Defendant completed his sentence on April 22, 2016, when his supervision was terminated and the case was closed.<sup>2</sup>

## II. DISCUSSION

### A. Standard of Review.

Whether Proposition 47 applies to defendant's conviction offenses is a question of statutory interpretation that we review de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.) We review any factual findings of the trial court for substantial evidence. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136.)

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<sup>2</sup> Defendant's unopposed request for judicial notice of documents establishing the date he completed his sentence is granted.

## **B. Analysis.**

### *1. Background Regarding Proposition 47.*

“Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors). Proposition 47 (1) added chapter 33 to the Government Code (§ 7599 et seq.), (2) added sections 459.5, 490.2, and 1170.18 to the Penal Code, and (3) amended Penal Code sections 473, 476a, 496, and 666 and Health and Safety Code sections 11350, 11357, and 11377.” (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091 (*Rivera*).)

“Under section 1170.18, a person ‘currently serving’ a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47.” (*Rivera, supra*, 233 Cal.App.4th at p. 1092; see § 1170.18, subd. (a).) “Section 1170.18 also provides that persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application with the trial court to have their felony convictions ‘designated as misdemeanors.’” (*Rivera, supra*, at p. 1093; see § 1170.18, subd. (f).)

As relevant to the present case, Proposition 47 added section 459.5, which provides in part as follows: “Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that

is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).” (§ 459.5, subd. (a).) Shoplifting, as newly defined in section 459.5, is a misdemeanor, unless committed by certain ineligible defendants. (*Ibid.*) Moreover, if an act can be charged under section 459.5, it must be so charged: “Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.” (*Id.*, subd. (b).)

Proposition 47 also added section 490.2, which provides as follows: “Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor . . . .” (§ 490.2, subd. (a).)

## *2. Section 459 Convictions.*

Defendant contends that his burglary convictions fall within the scope of section 459.5. The People contend that the trial court was correct to deny defendant’s petition, because defendant entered the bank branch with the intent to commit identity theft, not larceny. They further argue that the offense of shoplifting does not encompass the acts committed by defendant. We conclude that defendant has the better view. Indeed, a recent opinion of the California Supreme Court—*People v. Gonzales* (March 23, 2017) 2 Cal.5th 858 (*Gonzales*), issued after briefing in the present case was completed—not only supports our conclusion, but requires it.

The People urge that the word “larceny” in section 459.5 should be read narrowly, to apply only to specific types of thefts commonly referred to as shoplifting—specifically, the theft of merchandise offered for sale at a store. This argument, however, was explicitly rejected in *Gonzales*. The Supreme Court held that the term “shoplifting” as used in section 459.5 is a “term of art, which must be understood as it is defined, not in its colloquial sense.” (*Gonzales, supra*, 2 Cal.5th at p. 871, fn. omitted.) The Supreme Court found that section 459.5 applies to “an entry to commit a nonlarcenous theft,” such as “theft by false pretenses.” (*Gonzales, supra*, at p. 862.) Although the *Gonzales* defendant entered a bank to pass a forged check, rather than fraudulently accessing accounts through an ATM, the same reasoning applies; defendant’s actions fall within the scope of section 459.5.

*Gonzales* also forecloses the People’s identity theft argument. The Supreme Court concluded that, “even assuming [the defendant] entered the bank with an intent to commit identity theft, section 459.5, subdivision (b) would have precluded a felony burglary charge because his conduct *also* constituted shoplifting.” (*Gonzales, supra*, 2 Cal.5th at p. 876.) “A felony burglary charge could legitimately lie if there was proof of entry with intent to commit a nontheft felony or an intent to commit a theft of other property exceeding the shoplifting limit.” (*Id.* at p. 877.) In *Gonzales*, and here, however, that “did not occur.” (*Ibid.*)

On appeal, the People have not asserted any arguments based on the amount of loss caused by defendant’s actions. Properly so. When a petitioner seeks resentencing on multiple convictions, the court must consider the amount of loss in each conviction

separately and cannot deny resentencing based on an aggregated amount. (See *People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1309-1310 [court may not aggregate the amounts of the forged checks from separate forgery convictions to hold defendant ineligible for resentencing].) Each of the transactions underlying defendant's convictions (and, incidentally, each of the transactions underlying the counts dismissed pursuant to defendant's plea agreement) involved less than the statutory amount of \$950. The amount of loss, therefore, is no bar to defendant receiving relief pursuant to Proposition 47.

In short, defendant qualifies for relief under Proposition 47 with respect to each of the two burglary convictions. The trial court's conclusion to the contrary was erroneous.

*3. Section 484e, Subdivision (d) Conviction.*

The People contend that "Section 484e, subdivision (d) falls outside the scope of Proposition 47," so the trial court properly denied defendant's petition with respect to his conviction for theft of access card information (count 6). We disagree. Recently, so did the Supreme Court.

Section 484e, subdivision (d), defines a variety of grand theft: "Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft." Section 484e is not explicitly listed among Proposition 47's additions or amendments to California's statutory law in section 1170.18, subdivision (a). Nevertheless, section 490.2, added by Proposition 47, explicitly applies to section 484e, subdivision (d), redefining section 487

and “any other provision of law defining grand theft” to be petty theft and a misdemeanor, where the stolen property falls below the threshold value of \$950, unless the offense was committed by specified categories of recidivists. (§ 490.2, subd. (a).) And in *People v. Romanowski* (March 27, 2017) 2 Cal.5th 903, the California Supreme Court squarely held that theft of access card account information in violation of section 484e, subdivision (d) is “one of the crimes eligible for reduced punishment” under Proposition 47.

As with defendant’s burglary convictions, the People do not argue on appeal that defendant’s section 484e, subdivision (d) conviction falls outside the scope of Proposition 47 because of the value of the property at issue. The record establishes the value of the property taken (\$400), so the statutory threshold for relief is met.

#### *4. Disposition.*

The People suggest that, even if defendant’s convictions fall within the scope of Proposition 47, his petition nevertheless should be denied, because he has completed his sentence, and therefore falls under a “separate process” for relief under Proposition 47. The People argue he should be required to submit a new application, pursuant to section 1170.18, subdivision (f). We disagree.

Section 1170.18 identifies two ways a defendant sentenced or placed on probation prior to Proposition 47’s effective date can have his or her sentence for an enumerated felony reduced to a misdemeanor. First, pursuant to section 1170.18, subdivision (a), a defendant who is serving a sentence for a felony conviction that would have been a misdemeanor under Proposition 47 may “petition for a recall of sentence . . . .”

(§ 1170.18, subdivision (a).) Second, pursuant to section 1170.18, subdivision (f), a person who has completed his or her sentence for a felony conviction that would have been a misdemeanor under Proposition 47 may “file an application . . . to have the felony conviction . . . designated as misdemeanors.” Both a petition pursuant to section 1170.18, subdivision (a), and an application pursuant to section 1170.18, subdivision (f), require the trial court to determine whether the defendant’s felony conviction would have been a misdemeanor, had Proposition 47 been in effect at the time of sentencing.

(§ 1170.18, subds. (a), (f).) The two avenues for relief differ primarily, for present purposes, in that a petition pursuant to subdivision (a) may be denied, regardless of the conviction offense, if the trial court determines, in its discretion, that the petitioner would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).) No such dangerousness analysis applies to an application to redesignate a sentence pursuant to section 1170.18, subdivision (f). (See § 1170.18, subd. (g) [“If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.”].)

Neither section 1170.18, nor any appellate authority of which we are aware, instructs what should happen when, as here, a defendant completes his sentence while the appeal of the denial of his petition pursuant to section 1170.18, subdivision (a), is pending. Several courts of appeal have held—and we agree—that Proposition 47 does not permit the courts of appeal to reduce a defendant’s felony convictions to misdemeanors pursuant to Proposition 47 in the course of considering the defendant’s direct appeal; the request for relief under Proposition 47 must be initiated in the trial

court. (E.g., *People v. Shabazz* (2015) 237 Cal.App.4th 303, 314; *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1331-1332.) Here, however, defendant in fact sought relief in the trial court in the first instance.

We find the People's proposed procedure to be a waste of judicial resources (among others) that is not required by the statutory language, and we decline to adopt it. A petition for relief, initially brought under subdivision (a) of section 1170.18, is reasonably read to request implicitly designation of the offense as a misdemeanor pursuant to subdivision (f), if the passage of time should render the issue of resentencing moot because the original sentence has been completed. We so construe defendant's petition, and for the reasons discussed above find that it should be granted.

### III. DISPOSITION

The order is appealed from is reversed. The matter is remanded to the trial court with directions to enter a new order designating the convictions at issue to be misdemeanors, pursuant to section 1170.18, subdivisions (f) and (g).

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CODRINGTON

J.

We concur:

MCKINSTER

Acting P. J.

SLOUGH

J.